No. 20360

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

GLADYS TOWLES ROOT and GEORGE A. FORDE,

Appellees.

Appeal From the District Court for the Southern District of California, Central Division.

BRIEF OF APPELLEE GEORGE A. FORDE.

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I.

JURISDICTION.

Appellee George A. Forde concurs in the government's Statement of the Pleadings and Facts Disclosing Jurisdiction.

II.

STATEMENT OF THE CASE.

This is an appeal from an order dismissing an indictment.

The indictment was filed on December 9, 1964. [Clk. Tr. 54.] Prior to that time the government filed another indictment on July 29, 1964. [Clk. Tr. 2.] That indictment was dismissed on November 2, 1964. [Clk. Tr. 53.] In this brief we will refer to the prior indict-

ment (filed on July 29, 1964) as the "first indictment," and to the indictment now under consideration (filed on December 9, 1964) as the "second indictment".

The first indictment was in three counts. It charged as follows:

COUNT ONE alleged that appellees Root and Forde had conspired with John William Irwin, Joseph Clyde Amsler and Barry Worthington Keenan to obstruct justice and commit perjury in Case No. 33087-CD by having Irwin and Amsler testify falsely. [Clk. Tr. 2-5.] Case No. 33087 was the Frank Sinatra, Jr., kidnapping case. Irwin, Amsler and Keenan were the defendants. Root was the attorney for Irwin, and Forde was the attorney for Amsler.

COUNT TWO alleged that Root and Forde did obstruct justice by having Amsler commit perjury in the kidnapping case. [Clk. Tr. 6.]

COUNT THREE was identical to Count Two except that it alleged that Irwin had been induced to commit perjury. [Clk. Tr. 7.]

Root moved to dismiss the first indictment [Clk. Tr. 8-11.] At the first hearing on October 12, 1964, Forde joined in the motion. The court dismissed Counts Two and Three (obstruction of justice by suborning perjury) on the theory that they, in effect, charged subornation of perjury and were deficient because they did not allege what the claimed false testimony was. The hearing on the motion as to Count One (conspiracy to obstruct justice and commit perjury) was continued to November 2, 1964, so that briefs could be filed with respect to the question of whether the same rule of pleading applies to a conspiracy

count.[1] Briefs were filed on this point. [Clk. Tr. 17-38, 47-51, 40-46.] On November 2, 1964, Count One was dismissed on the ground that it did not allege the false testimony. [Clk. Tr. 53.] The government did not appeal from the order dismissing the first indictment, and it is now final.

The second indictment is in five counts. It charges as follows:

COUNT ONE of the second indictment is, for all practical purposes, the same as Count One of the first indictment. [Compare: Clk. Tr. 2-4 and Clk. Tr. 55-59.] It alleges a conspiracy to obstruct justice, commit perjury and suborn perjury. The only differences are that subornation of perjury is added and six general subject matters are listed concerning which Irwin and Amsler were to give false testimony. As with the first indictment, the second indictment does not allege the claimed false testimony. [Clk. Tr. 54-59.]

COUNT TWO alleges subornation of perjury with respect to Amsler. It sets forth approximately seventy pages of Amsler's testimony at the kidnapping trial, and alleges that some of the testimony was false. [Clk. Tr. 60-129.] The pattern is to quote several pages of the transcript, and then allege that "said testimony was false . . . in that. . . ." Then will follow a brief statement of what the government contends is true. [Clk. Tr. 129.] The reader is left with the task of going back through the transcript and trying to figure out what portions of the testimony, if any, contradict the government's contention. There is also a general allegation that "said testimony was material to the issues of guilt

[1]See: Reporter's Transcript, October 12, 1964.

or innocence." [Clk. Tr. 129.] It is not alleged how or why the testimony was material. In many cases it is impossible to understand the claim of materiality. For example, in one place the government alleges that the truth of the matter was that "when Amsler's attorney told Amsler to 'cooperate fully with the FBI' that did not mean to Amsler that he would make believe it was a real crime when in truth and in fact it wasn't." [Clk. Tr. 129.] What Amsler's attorney told him and what Amsler understood, all after the crime was committed, was not material to the issues of the case.

COUNT THREE is the same as Count Two except that it recites Irwin's testimony. [Clk. Tr. 130-199.]

COUNT FOUR is the same as Count Two of the first indictment. [Compare: Clk. Tr. 6 and Clk. Tr. 199.] It alleges obstruction of justice by having Amsler testify falsely. The only difference is that the general subject matters stated in Count One are repeated.

COUNT FIVE is the same as Count Four except that it relates to Irwin. [Clk. Tr. 201.]

Both appellees moved to dismiss the second indictment. [Clk. Tr. 202-214, 215-231.] As to Counts One, Four and Five (conspiracy and obstruction of justice) the same grounds were urged as had been raised with respect to Counts One, Two and Three of the first indictment. [Compare: Clk. Tr. 28-35 and Clk. Tr. 204-210, 213.] Counts Two and Three of the second indictment (subornation of perjury) were new. The grounds in support of the motions to dismiss these Counts were that: (1) it is not alleged that the defendants knew that the witnesses knew their testimony was false; (2) materiality is not sufficiently alleged; (3) it cannot be

determined which portions of the quoted testimony of the witnesses were claimed to be false. [Clk. Tr. 211-212; 223-228.][2] The motions were granted, and this appeal followed. [Clk. Tr. 286-288; 291-292.]

III.
SUMMARY OF ARGUMENT.

Counts One, Four and Five of the second indictment do not state an offense because they do not set forth the alleged false testimony. Count One charges a conspiracy to commit perjury. Counts Four and Five charge obstruction of justice by surborning perjury. In either case, perjury or subornation of perjury, it is essential to allege the testimony of the witness that it claimed to be false. It is not sufficient to allege only general subject matters that the witness testified about.

The dismissal of Counts One, Four and Five of the second indictment was also required under the rule of *res judicata.* These Counts are no different in principle from Counts One, Two and Three of the first indictment. The first count of each indictment alleged a conspiracy to suborn perjury with respect to certain subject matters. The first indictment was dismissed on the ground that the false testimony must be set forth. The government did not appeal from the dismissal of the first indictment. That order was and is a final judgment. The issue of law which it determined is *res judicata* between these parties.

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[2]There were additional grounds asserted by appellee Root in support of her motion. [Clk. Tr. 215.] The trial court specifically rejected these points and based its ruling on the grounds set forth above. [Clk. Tr. 288.] This does not preclude consideration of those grounds on this appeal. *United States v. Meyer* (5th Cir. 1959), 266 F. 2d 747, 756.

Counts Two and Three of the second indictment are new allegations. They allege subornation of perjury, and they quote approximately 140 pages of testimony of the witnesses. But these Counts are deficient for three reasons: (1) It is not alleged that the defendants knew that the witnesses knew their testimony was false; (2) the portions of the testimony claimed to be false are not specified; (3) the materiality of the testimony is not shown.

IV.

ARGUMENT.

A. Counts One, Four and Five of the Second Indictment Do Not State an Offense Because They Do Not Set Forth the Alleged False Testimony.

Count One alleges a conspiracy to suborn and commit perjury.[3] [Clk. Tr. 54-59.] The alleged false testimony is not set forth in Count One. It is charged only that Amsler and Irwin would be instructed to and would testify falsely on certain subjects, namely, "that Frank Sinatra, Jr., knew beforehand that he was to be kidnapped"; "that the kidnapping of Frank Sinatra, Jr., was planned by people 'higher up' than Barry W. Keenan"; "that the kidnapping of Frank Sinatra, Jr., was a publicity stunt and a hoax"; that there was a person named 'Wes' or 'West' who was involved in planning the kidnapping of Frank Sinatra, Jr."; "that they were to be caught by law enforcement personnel"; "that once they were caught they would conduct themselves as if they had really kidnapped Frank

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[3]Count One also alleges that it was an object of the conspiracy to obstruct justice. However, the only method of obstructing justice that is alleged is perjury, and the government's brief discusses only the perjury allegations. (App. Op. Br. 14-21.)

Sinatra, Jr., and not reveal that it was a hoax and publicity stunt". [Clk. Tr. 57.]

Counts Four and Five allege obstruction of justice by suborning perjury. Count Four says that Amsler was induced to give false testimony. Count Five makes identical allegations for Irwin. Neither Count sets forth the claimed false testimony. Both Counts repeat the subject matters of Count One as to which the witnesses assertedly testified falsely in some unspecified manner. [Clk. Tr. 198-201.]

This method of attempting to plead perjury by reference to subject matters is not sufficient. The reason it is not sufficient is the fundamental principle that the accused must be notified by the indictment of what it is that he is accused of doing. In the case of some crimes, adequate notice is not given by pleading in the generic or general terms of the statute. Perjury is one of those crimes. In a perjury case the accused must be confronted in the indictment with the false words. Otherwise the defendant cannot tell what it is, that is what part of the testimony it is, that he is going to be called upon to defend. It does no good to say that testimony was false with respect to a subject matter or even with respect to a specific fact. In any case a witness can and generally always does say many different things relating to a subject or fact when examined and cross-examined about it. If the defendant is told only that something is false about what he said he is left to guess what that something is. Another and more serious vice of the subject matter pleading is that it does not say what is true or false about the subject matter. Suppose the indictment charged that the defendant testified falsely (or suborned a witness to testi-

fy falsely) on the subject matter "that the car was blue". What does that mean? Is it claimed that the car was blue and therefore that anything said tending to show it was not blue was false? Or does it mean the opposite—that any testimony indicating it was blue was false? It is no different to say that there was false testimony on the subject: "that Frank Sinatra, Jr., knew beforehand that he was to be kidnapped". What is the charge? Is it that Frank Sinatra, Jr., did know, or is it that he did not know? The answer to this question is not alleged one way or the other in Counts One, Four and Five of the second indictment.

Suppose this had been set forth, *i.e.,* assume an allegation either that the subject matter was true or that it was false. The defendant would then know the government's contention as to the truth of the subject matter. But that still does not tell him what the claimed false testimony is. What is it that was said indicating Frank Sinatra, Jr., knew beforehand, etc., that is claimed to be a false statement? This is not an academic problem. In this case the witnesses may have and probably did testify to over 100 separate facts bearing on the issue of Frank Sinatra, Jr.'s knowledge. It would be a most difficult task to even ferret out all of the relevant parts of the testimony. Even if that could be done, the defendant would be no better off. He would still not know what parts of this maze are going to be relevant to the perjury case. There is no substitute for the rule that when perjury is charged the indictment must set forth the alleged false testimony. If perjury is pleaded in the generic terms of the statute, *i.e.,* "the defendant testified falsely in a case", the indictment says nothing. If the indictment goes no further than to say that the

defendant testified falsely on or concerning a subject or fact in a case, it says no more.

The cases support the rule we advocate. In *Russell v. U. S.* (1962), 369 U.S. 749, 765-766, 8 L. Ed. 2d 240, 82 S. Ct. 1038, the Supreme Court reiterated the fundamental principle that an indictment must inform the defendant of what it is that he is accused of. It is not sufficient to merely say that the defendant committed some specified crime by pleading only the statutory elements of the offense. The indictment must notify the defendant of the operative facts he is accused of which constitute the crime. This basic requirement of pleading in criminal cases has not been watered down by the modern rules of procedure which permit and require simplified pleading. 369 U.S. at 765-766:

> " 'It is an elementary principle of criminal pleading, that where the definition of an offense, whether it be at common law or by statute, 'includes generic terms, it is not sufficient that the indictment shall charge the offense in the same generic terms as in the definition; but it must state the species, — it must descend to particulars.' United States v. Cruikshank, 92 US 542, 558, 23 L ed 588, 593. An indictment not framed to apprise the defendant 'with reasonable certainty, of the nature of the accusation against him . . . is defective, although it may follow the language of the statute.' United States v Simmons, 96 US 360, 362, 24 L ed 819, 820. 'In an indictment upon a statute, it is not sufficient to set forth the offense in the words of the statute, unless those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the

elements necessary to constitute the offense intended to be punished; . . .' United States v Carll, 105 US 611, 612, 26 L ed 1135. 'Undoubtedly the language of the statute may be used in the general description of an offence, but it must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offence, coming under the general description, with which he is charged.' United States v. Hess, 124 US 483, 487, 31 L ed 516, 518, 8 S Ct 571. See also Pettibone v. United States, 148 US 197, 202-204, 37 L ed 419, 422, 423, 13 S Ct 542; Blitz v United States, 153 US 308, 315, 38 L ed 725, 727, 14 S Ct 924; Keck v United States, 172 US 434, 437, 43 L ed 505, 507, 19 S Ct 254; Morissette v United States, 342 US 246, 270, note 30, 96 L ed 288, 304, 72 S Ct 240. Cf. United States v Petrillo, 332 US 1, 10, 11, 12, 91 L ed 1877, 1884, 1885, 67 S Ct 1538. That these basic principles of fundamental fairness retain their full vitality under modern concepts of pleading, and specifically under Rule 7(c) of the Federal Rules of Criminal Procedure, is illustrated by many recent federal decisions.[13]"

In making the above statement in the *Russell* case, the Supreme Court cited three District Court cases: *United States v. Simplot* (D.C. Utah), 192 F. Supp. 734; *United States v. Devine's Milk Laboratories* (D. C. Mass.), 179 F. Supp. 799; *United States v. Apex Distributing Co.* (D.C.R.I.), 148 F. Supp. 365.[4] On their facts, these cases are determinative of the point now under consideration. In *United States v. Simplot*

[4]See: Footnote 13, 369 U.S. at 766.

(D.C. Utah 1961), 192 F. Supp. 734, *supra,* the indictment charged perjury as follows (192 F. Supp. at 735):

> "The Grand Jury charges:
>
> "That on or about February 8, 1960, J. R. Simplot, having taken an oath before the United States District Court for the District of Utah in a case being heard in that court, to wit, Archer vs. J. R. Simplot Company, Civil No. C-31-58, in which case the law of the United States authorized an oath to be administered, that he would testify truly, willfully and contrary to such oath stated and testified to a material matter which he did not believe to be true, said testimony was to an alleged conversation between himself and John Archer in Sun Valley, Idaho, in the spring of 1954, concerning the termination of their business relationship, in violation of Section 1621, Title 18, United States Code."

The *Simplot* indictment, in respect of its allegation of perjury, was no different in principle from Counts One, Four and Five of the indictment now under consideration. In *Simplot* the charge was that in a certain case the defendant testified falsely to a material matter, namely, ". . . to an alleged conversation between himself and John Archer in Sun Valley, Idaho, in the spring of 1954, concerning the termination of their business relationship". The indictment now under consideration is even less specific. It says, for example, that Irwin and Amsler testified falsely on the subject "that Frank Sinatra, Jr., knew beforehand that he was to be kidnapped". The indictment in the *Simplot* case was dismissed on the specific ground that it was not

sufficient to allege only the subject matter with respect to which false testimony was allegedly given. 192 F. Supp. at 737:

> "Does the additional allegation contained in the indictment in question cure what otherwise would be a fatal deficiency?:
>
> '* * * said testimony was to an alleged conversation between himself and John Archer in Sun Valley, Idaho, in the spring of 1954 concerning the termination of their business relationship * * *.'
>
> Stated another way, does a statement of the general subject matter of allegedly false testimony, with no indication whatsoever as to its substance, tenor or direction satisfy the requirements of the Constitution and of the rule? In the context in which the problem is presented here, I do not think that it does. The court is left to speculate as to the intent or substance of any testimony claimed to have been false and the only fact which the defendant now knows, or which another court in considering a plea of res judicata would know, is that sometime during the day referred to in the indictment the defendant is claimed to have testified under oath falsely about something in some way relating to an alleged conversation between himself and John Archer in Sun Valley, Idaho, in the spring of 1954 touching upon the termination of their business relationship. It may be that the Government may know what is meant to be referred to as the false statement or statements. If so, it would seem simple to frame a proper indictment. This has not been done."

The other two cases cited in *Russell v. U.S.* are: *United States v. Devine's Milk Laboratories* (D.C. Mass. 1960), 179 F. Supp. 799, and *United States v. Apex Distributing Co.* (D.C.R.I. 1957), 148 F. Supp. 365, *supra.* The significance of these cases is that they were conspiracy cases. In *United States v. Devine's Milk Laboratories* the indictment charged a conspiracy to ". . . make . . . false statements in matters within the jurisdiction of the Department of the Army . . .". In *United States v. Apex Distributing Co.* the indictment also alleged a conspiracy to make false statements. In both cases it was held that the indictments were insufficient because they did not allege what the false statements were.

All of the cases which the government cites in its brief are either not in point or they are *contra* to and cannot be reconciled with the rule announced by the Supreme Court in the *Russell* case. Following is a discussion of all cases cited in the government's brief in respect of Counts One, Four and Five:[5]

United States v. Falcone (1940), 311 U.S. 205, 8 L. Ed. 128, 61 S. Ct. 204. (App. Op. Br. 14.) This was not a perjury or false statement case. It involved a conspiracy to operate illicit stills in violation of the revenue laws. It was held that the evidence was sufficient to warrant a conviction. The sufficiency of the indictment was not questioned.

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[5]This discussion of the government's cases does not include certain cases which the government does not rely upon in support of its position. These are: *Russell v. U.S.* (1962), 369 U.S. 749, 8 L. Ed. 2d 240, 82 S. Ct. 1038, App. Op. Br. 16, 19, 20; *United States v. Devine's Milk Laboratories* (D.C. Mass. 1960), 179 F. Supp. 799, App. Op. Br. 19; *United States v. Apex Distributing Co.* (D.C.R.I. 1957), 148 F. Supp. 365, App. Op. Br. 19; *Pettibone v. U.S.* (1893), 148 U.S. 197, 37 L. Ed. 419, 13 S. Ct. 542, App. Op. Br. 20, 21.

Blumenthal v. U. S. (9th Cir. 1946), 158 F. 2d 883, affd. 332 U.S. 539, 92 L. Ed. 154, 68 S. Ct. 248. (App. Op. Br. 14.) This case involved a conspiracy to sell liquor over ceiling prices in violation of OPA regulations. It was contended that the indictment did not state an offense on the theory that there cannot be a violation under the general conspiracy statute because the Emergency Price Control Act makes it unlawful to agree to violate price regulations. This claim was rejected. The sufficiency of the indictment to allege a conspiracy was not attacked.

Brown v. U. S. (8th Cir. 1906), 143 Fed. 60. (App. Op. Br. 16.) This was a mail fraud case. Mail fraud is, in effect, a conspiracy to defraud in that it requires a "scheme or artifice to defraud." The indictment was attacked and held sufficient. But it apparently alleged the scheme in detail. The indictment is not set forth in the opinion. The court's description of the indictment indicates that it did allege what the false representations were. (143 Fed. at 63.)

Smiley v. U. S. (9th Cir. 1950), 181 F. 2d 505. (App. Op. Br. 16.) The indictment in this case charged that the defendant on three separate occasions represented to three different named law enforcement officers that he was a United States citizen, whereas he was not. It is a crime for an alien to represent to anyone that he is a citizen. 8 USCA 746. The indictment was held sufficient. What else could it say? This case is not in point. Counts One, Four and Five of the second indictment now under consideration do not say that Irwin or Amsler represented or said "that Frank Sinatra, Jr., knew beforehand that he was to be kidnapped". It is

only alleged that they agreed to and did say something false in respect of that subject.

Wong Tai v. U. S. (1927), 273 U.S. 77, 71 L. Ed. 545, 47 S. Ct. 300. (App. Op. Br. 16, 17.) This case involved a conspiracy to import and sell opium. The indictment set forth the dates on which the opium was imported, the name of the ship it was imported on, and the number of sacks of opium in each shipment. The *Wong Tai* case is not relevant to the question of whether it is necessary to allege the false testimony in a perjury indictment.

United States v. Chunn (4th Cir. 1965), 347 F. 2d 717. (App. Op. Br. 16.) This case has no application. It did not involve perjury or conspiracy. It was an assault and battery case. The indictment charged that on a specified date the defendants assaulted a named federal officer "by pointing and firing a deadly weapon, that is, a small caliber rifle, and beating, striking, whipping and stomping the said Charles Boler, Jr.".

Stapleton v. U. S. (9th Cir. 1958), 260 F. 2d 415. (App. Op. Br. 16.) The indictment in this case charged that the defendant stole certain specified tools and equipment belonging to B. C. Mica Mines, Ltd. "with intent to deprive the said owner thereof". The argument was that the indictment should have said that the taking was without the consent of the owner. The court held that this was implicit in the words quoted.

United States v. Rabinowitz (1915), 238 U.S. 78, 59 L. Ed. 1211, 35 S. Ct. 682. (App. Op. Br. 17.) The indictment here alleged a conspiracy to conceal assets in bankruptcy. The point decided was that, although only a bankrupt can commit the offense of con-

cealing assets, other persons can be guilty of conspiring with the bankrupt to do this.

American Tobacco Co. v. U.S. (1946), 328 U.S. 781, 90 L. Ed. 1575, 66 S. Ct. 1125. (App. Op. Br. 17.) This was an anti-trust case. The indictment is not fully set forth in the opinion, and its sufficiency was not questioned or discussed.

Hagner v. U.S. (1932), 285 U.S. 427, 76 L. Ed. 861, 52 S. Ct. 417. (App. Op. Br. 17) This was a mail fraud case. The details of the scheme and artifice to defraud were alleged, but are not set forth in the opinion. The problem in the case was that there was only one mailing, and it was alleged that the envelope was deposited in a post office in Pennsylvania addressed to Washington, D.C. The statute requires that the defendant "cause to be delivered by mail". The defendant argued that the indictment was defective because it did not allege delivery. The court held that there is a presumption of delivery from mailing.

United States v. Debrow (1953), 346 U.S. 374, 98 L. Ed. 92, 74 S. Ct. 113. (App. Op. Br. 17, 33.) This was a perjury case. The only point discussed was whether it is necessary to allege the name of the person who administered the oath. The indictment did allege the false testimony. (See: Opinion of Court of Appeals, 203 F. 2d at 702-703, n. 1.)

Stein v. U.S. (9th Cir. 1962), 313 F. 2d 518. (App. Op. Br. 17.) This case involved a conspiracy to receive, conceal and transport illegally imported heroin. It was not alleged that the defendants knew the heroin had been illegally imported. The court held the indictment sufficient because heroin cannot be imported legally.

Williamson v. U.S. (1907), 207 U.S. 425, 52 L. Ed. 278, 28 S. Ct. 163. (App. Op. Br. 20) This case was a conspiracy to suborn perjury. But it does not support the government's position. The indictment specifically stated the exact false statement which people would be suborned to make. 207 U.S. at 448:

> ". . . the object of the conspiracy is stated to be the suborning of a large number of persons to go before a named person, stated to be a United States commissioner of the district of Oregon, and, in proceedings for the entry and purchase of land in such district under the timber and stone acts, make oath before the official that the lands 'were not being purchased in good faith to be appropriated to the own exclusive use and benefit of those persons, respectively, and that they had not directly or indirectly made any agreement, or contract in any way or manner, with any other person or persons whomsoever, by which the titles which they might acquire from the said United States in and to such lands should enure in whole or in part to the benefit of any person except themselves, . . ."

Counts One, Four and Five of the second indictment now under consideration do not say it was a part of the conspiracy that Irwin and Amsler would make or that they were suborned to make any particular statement. It is alleged, for example, that they would testify falsely on the subject that "Frank Sinatra, Jr., knew beforehand that he was to be kidnapped". Nothing is alleged as to what they would say about this. It is not even stated whether they would say Frank Sinatra, Jr., did know or that he did not know. There is no

comparison between this and the *Williamson* case where the exact false statement was specifically set forth.

Craig v. U.S. (9th Cir. 1936), 81 F. 2d 816. (App. Op. Br. 20.) The government cites this case as involving a "similar" conspiracy pleading. It is not similar. The indictment in the *Craig* case charged a conspiracy to obstruct justice by trying to get a case dismissed by bribing government officials and exercising political influence. Every detail of the plan was set forth. The court said (81 F. 2d at 821):

> ". . . the count in question descends to almost tedious minutiae in detailing the terms of the conspiracy."

Turf Center, Inc. v. U.S. (9th Cir. 1963), 325 F. 2d 793 (App. Op. Br. 20.) This was not a conspiracy or perjury case. The charge was using an interstate facility (telegraph) to carry on a gambling business.

United States v. Perlstein (3rd Cir. 1942), 126 F. 2d 789. (App. Op. Br. 21.) This case involved a conspiracy to obstruct justice, and one of the means of obstructing justice was subornation of perjury. The case does not support the government's position for two reasons: (1) The sufficiency of the allegations of perjury were not discussed or decided. (2) The indictment did set forth what it was that the witnesses would be suborned to say. The witnesses would be told not to identify the defendants, and they would be told to deny that the defendants had anything to do with a still. (The case in which the witnesses were to be called involved operation of an illegal still.)

Roberts v. U.S. (9th Cir. 1956), 239 F. 2d 467. (App. Op. Br. 34, 35, 38.) This case involved both per-

jury and obstruction of justice by attempting to suborn perjury. But the false statements were set forth. The first count said the defendant committed perjury by falsely testifying that he had made a certain written contract. The second count alleged that he tried to get a witness to say falsely that she had seen the contract.

Catrino v. U.S. (9th Cir. 1949), 176 F. 2d 884. (App. Op. Br. 34.) This case was similar to the *Roberts* case. One count charged subornation of perjury; another was for obstructing justice by suborning the same witness to commit the same perjury. In each count the false testimony was fully alleged.

Segal v. U.S. (8th Cir. 1957), 246 F. 2d 814. (App. Op. Br. 36.) This was a subornation of perjury case, but again the false testimony was alleged in the indictment. The indictment is not set out in the opinion, but the court says there were nine paragraphs dealing with separate subject matters and each paragraph alleged the testimony claimed to be false.

United States v. Straitiff (D.C. Pa. 1953), 14 F.R.D. 337. (App. Op. Br. 37.) The defendant, who was the cashier of a bank, was charged with taking cash from the bank. Rule 7(c) of the Federal Rules of Criminal Procedure provides that an indictment may allege that "the means by which the defendant committed the offense are unknown". The defendant contended that the indictment was defective because it did not say this, *i.e.,* that the means were unknown. The court held that this provision of Rule 7(c) is permissive and not mandatory.

Anderson v. U.S. (6th Cir. 1954), 215 F.2d 84. (App. Op. Br. 37.) The indictment in this case alleged obstruction of justice in that the defendants agreed to

"alter the testimony" of certain witnesses. In so far as appears from the opinion, the manner in which the testimony was to be altered was not set forth. But the allegations of the indictment are not fully set forth in the opinion. At 215 F. 2d, page 85, the court quotes the portion of the indictment which is quoted in the government's brief. (App. Op. Br. 38-39, n. 13.) At 215 F. 2d, page 87, n. 1, the court refers to another portion of the indictment in quoting from the jury instructions. There it is said that the defendants accepted money in consideration of their agreement. This aspect of the indictment is not contained in the portion quoted on page 85 of the opinion. In other words, you cannot tell from reading this case what all of the allegations of the indictment were. Also, this case does not discuss the point now under consideration. There is no discussion of the problem of having to set forth the false testimony in the indictment.

United States v. Solow (D.C.S.D.N.Y. 1956), 138 F. Supp. 812. (App. Op. Br. 38.) This case is easily distinguishable. The obstruction of justice charged was destruction of certain specified records which were material evidence in a grand jury investigation.

Parsons v. U.S. (5th Cir. 1951), 189 F. 2d 252. (App. Op. Br. 38.) In this case the charge was obstruction of justice by bribing a witness. The allegations of the indictment are not set forth in the opinion. The only point decided with respect to sufficiency of the indictment is that it is not necessary to allege that the defendant knew that the person he bribed was or would be a witness.

Hicks v. U.S. (4th Cir. 1949), 173 F. 2d 570. (App. Op. Br. 38.) This was a case of bribing a juror.

The indictment is not set out in the opinion, and the court does not indicate in any way what the allegations of the indictment were.

Nye v. United States (4th Cir. 1943), 137 F. 2d 73. (App. Op. Br. 38.) This case is either distinguishable on the ground that a different rule applies when the defendant is charged with using a false writing, as distinguished from making or causing another to make a false oral statement; or it is *contra* to the *Russell* case and impliedly overruled. In *Nye v. United States* the defendant was charged in one count with obstructing justice by fraudulently obtaining false letters and affidavits which he used to try to get a case dismissed. The false documents were specifically described in another count of the indictment. The court noted that the description of the documents in one count could not be used to aid the other because not incorporated by reference. The count which did not specifically describe the documents was nevertheless held sufficient. This case cannot be reconciled with *United States v. Devine's Milk Laboratories* (D.C. Mass. 1960), 179 F. Supp. 799, which was cited with approval by the Supreme Court in *Russell v. United States* (1962), 369 U.S. 749, 766, 8 L. Ed. 2d 240, 82 S. Ct. 1038. In *Devine's Milk Laboratories* the indictment charged a conspiracy to make and present false, fictitious and fraudulent claims to the Department of the Army. The indictment was held insufficient for failure to specify what the claims were. There is also this distinction. In *Devine's Milk Laboratories*, as in the instant case of Root and Forde, the sufficiency of the indictment was being tested by motion before trial. In the *Nye* case, and in all other cases we have read where

a liberal rule of pleading was allowed, the attack on the indictment was after trial and it was conceded that the deficiencies of the indictment did not prejudice the defendant in his defense.

Seawright v. United States (6th Cir. 1955), 224 F. 2d 482. This was not a subornation of perjury situation. The indictment charged that the defendant endeavored to "influence, intimidate and impede" a witness. It was not alleged that the object of the endeavor was to induce the witness to testify falsely. The only objection made to the indictment was that it should have been alleged that the endeavor was "corrupt" and that the witness was impeded "in the discharge of her duty."

Cole v. United States (9th Cir. 1964), 329 F. 2d 437. This case is distinguishable for two reasons: (1) no attack was ever made on the indictment, either in the trial court or in the court of appeals. (2) *Cole* did not involve false testimony. The indictment charged that the defendant endeavored to influence, intimidate and impede a witness "in connection with certain testimony he might give." But everyone knew that the sole operative fact involved was that Cole had induced Benton to take the Fifth Amendment when he appeared before the grand jury. The only issues in the *Cole* case were the manner in which Cole induced Benton and whether it could be a crime to induce taking the Fifth Amendment. This has no similarity to the case now under consideration. Counts One, Four and Five of the second indictment charge that the defendants conspired to have Irwin and Amsler give false testimony and that the defendants did induce Irwin and Amsler to give false testimony. In this posture it is essential to

allege what the claimed false testimony is. This is not alleged, and these counts are deficient for that reason.

The government's argument in defense of these counts is that in either case (conspiracy to suborn perjury or obstruction of justice by suborning perjury) it is not necessary that the unlawful agreement or endeavor be accomplished. The defendants could be held guilty of conspiracy or endeavor to obstruct justice even though the witnesses never took the stand. Therefore, says the government, how can they be expected to allege the false testimony when there might be cases where there is no false testimony? (App. Op. Br. 16-17, 34-35.) There are two answers to this argument.

First. The case the government supposes is not presented here. Irwin and Amsler did take the witness stand, and according to the indictment they did give false testimony.

Second. If the hypothetical situation proposed by the government were presented, it would still be necessary to allege the proposed false statements. Stated another way, there would be no crime unless the defendants agreed to induce the witnesses to say something. Surely it would not be criminal to agree "to suborn perjury" with no discussion or understanding of what was to be said. This would not be an agreement to do anything. In any event, this situation is not presented. The witnesses took the stand and testified. The government claims they testified falsely, and it is incumbent upon the government to allege in the indictment what the claimed false testimony is.

The government also says the defendants were defense attorneys in the Frank Sinatra, Jr., kidnapping

case and therefore knew all of the details of the case. (App. Op. Br. 18.) This, of course, has nothing to do with the question of whether the allegations of the indictment are sufficient. Beyond that, it is no answer to the real and practical necessity of informing a defendant in a perjury case of what the claimed false testimony is. Of course the defendants are familiar with the case, and they can inform themselves of all of the testimony by reading the transcript. But there is no way they can know what parts of the testimony are claimed by the government to be false unless the government informs them of its contentions in the indictment.

B. The Dismissal of Counts One, Four and Five of the Indictment Was Required Under the Rule of Res Judicata.

Counts One, Four and Five of the second indictment are no different in principle from Counts One, Two and Three of the first indictment. The only thing added by the second indictment is a list of six subject matters concerning which Irwin and Amsler would and did give false testimony. In neither indictment is it specified what the false testimony is. The first indictment was dismissed on the ground that it was insufficient because it did not allege the false testimony. The government did not appeal from the dismissal of the first indictment. That judgment is final. Under the rule of *res judicata* the issue of law which it decided cannot now be reopened. The dismissal of the first indictment determined that the government must plead the alleged false testimony. The government is now estopped to contend otherwise.

We are not here contending that the dismissal of the first indictment is a complete bar to reindictment for the same crime. The point we now make is that even if reindictment is permissible, the effect of the prior dismissal nevertheless operates as a final determination between the parties of any issue of fact or law which it decided.

In *United States v. Oppenheimer* (1916), 242 U.S. 85, 87, 61 L. Ed. 161, 37 S. Ct. 68, the first indictment for conspiracy to conceal assets in bankruptcy was dismissed on the ground that the statute of limitations had run. It was subsequently decided by the Supreme Court in *United States v. Rabinowich* (1915), 238 U.S. 78, 59 L. Ed. 1211, 35 S. Ct. 682, that the statute would not be a defense. The defendant was reindicted. The statute of limitations was no longer a defense. But it was held that as to this defendant and as to this crime the prior determination was *res judicata.*

In *United States v. DeAngelo* (3rd Cir. 1943), 138 F. 2d 466, the defendant was indicted for robbery and conspiracy to commit the same robbery. He was tried first for the substantive offense and acquitted. This was not a bar to trial of the conspiracy because it is a separate offense. However, in proving the conspiracy it was necessary to show that the defendant was present at the scene of the robbery. The court held that this issue was necessarily determined in favor of the defendant at the prior trial and so was *res judicata.*

In *Stroud v. U.S.* (10th Cir. 1960), 283 F. 2d 137, the defendant was tried for murder three times. On each trial he was convicted and appealed. On one of the appeals he argued that the subsequent trials and con-

victions were invalid because of double jeopardy. The question was decided against him. Later he moved to vacate the sentence, raising the same ground of double jeopardy. The court held that this issue was *res judicata.*

See also: *United States v. Salvatore* (D.C.E.D. Pa. 1956), 140 F. Supp. 470; *Wheatley v. U.S.* (10th Cir. 1961), 286 F. 2d 519; *United States v. Rangel-Perez* (D.C.S.D. Calif. 1959), 179 F. Supp. 619.

C. Counts Two and Three of the Second Indictment Do Not State an Offense Because It Is Not Alleged That the Defendants Knew That the Witnesses Knew Their Testimony Was False, the Portions of the Testimony Claimed to Be False Are Not Specified, and the Materiality of the Testimony Is Not Shown.

1. It Is Not Alleged That the Defendants Knew That the Witnesses Knew Their Testimony Was False.

There are three types of knowledge required for subornation of perjury: (1) The defendant must know the testimony is false; (2) the witness must know the testimony is false; (3) the defendant must know that the witness knows the testimony is false. If any one of the three is lacking there is no subornation of perjury. If the defendant believes in the truth of the testimony he does not suborn perjury even if the witness commits perjury. If the witness believes in the truth of the testimony there is no perjury, and there can be no subornation of perjury even if the defendant thinks the testimony is false. So also, if the defendant thinks the witness is under the impression that he is telling the truth, there is no subornation even if both of them know the testimony is false.

United States v. Evans (D.C. Calif. 1884), 19 Fed. 912:

"The indictment, after the usual formal allegations, which seem to be quite sufficient, charges in substance that the defendant procured one Burnett to commit the crime of perjury by swearing to certain allegations contained in an affidavit made and subscribed by him on an application for an entry of certain timber lands. It avers that Burnett knew that these allegations were false, and it negatives them by averring what the facts were. It also avers that the defendant, when he procured Burnett to swear to these allegations, also knew that they were false. It does not aver that he knew that Burnett was aware of their falsehood. To sustain an indictment for procuring a person to commit perjury it is obviously necessary that perjury has in fact been committed. It cannot be committed unless the person taking the oath not only swears to what was false, but does so willfully and knowingly. He who procures another to commit perjury must not only know that the statements to be sworn to are false, but also that the person who is to swear to them knows them to be false; for unless the witness has that knowledge the intent to swear falsely is wanting, and he commits no perjury. It is therefore essential that the indictment should aver, not only that the statements made by the witness were false in fact, and that he knew them to be false, but also that the party procuring him to make those statements knew that they would be intentionally and willfully false on the part of the witness, and thus the crime of perjury would be committed by him."

The most that can be said of Counts Two and Three of the second indictment is that it is alleged that the defendants and the witnesses knew the testimony was false. The third element of knowledge of the witness' knowledge is entirely lacking.

The government attempts to justify its failure to make this allegation by saying, in effect, that it may be implied from the recital that the defendants "knowingly procured the witnesses to knowingly commit perjury". (App. Op. Br. 25.) The fact that this cannot be implied from the quoted language is illustrated in one of the cases cited by the government. In *Ryan v. U.S.* (7th Cir. 1932), 58 F. 2d 708, the indictment used almost the identical language now relied upon by the government. It was alleged that the "appellant and Joseph D. Hopewell did willfully, knowingly, and corruptly suborn, instigate, and procure May V. Pearson to willfully, knowingly, feloniously and corruptly testify. . . .". (58 F. 2d at 708.) But the pleader added also the following allegation, which is essential: ". . . and at the time she gave it, she, as well as appellant and Hopewell, knew that it was false, and appellant and Hopewell knew that she knew it was false . . .". (58 F. 2d at 709.)

2. The Portions of the Testimony Claimed to Be False Are Not Specified.

Counts Two and Three of the second indictment set forth approximately 140 pages of testimony of the witnesses Irwin and Amsler. We therefore do not claim that these counts of the indictment are deficient for failure to allege the testimony. Our argument is that the indictment does not adequately notify the defend-

ants of the portions of the testimony that are claimed to be false.

The pattern of the indictment is to quote from the transcript for several pages and then say that certain things about it are false. The problem is that it is next to impossible to figure out the claims of falsity. Take, for example, the first specification of perjury. [Clk. Tr. 61-71.] The first ten pages quote Amsler's testimony about a conversation with Keenan. According to Amsler, Keenan told him about the plan for the kidnapping, and Keenan showed him a thirty or forty-page folder outlining the plan. In discussing the plan, Keenan tells Amsler, among other things, that Frank Sinatra, Jr., is to know about it beforehand. Then comes the claim of falsity. The government says: "At said time and place, mid-October, 1963, at Castellammare, Los Angeles, California, Barry W. Keenan did not tell Joseph Clyde Amsler that the person that was to be the victim [Frank Sinatra, Jr.] of this 'operation' was to know of it beforehand;" [Clk. Tr. 17, lines 17-21.] A statement to this effect can be found in Amsler's testimony. [Clk. Tr. 12, lines 3-4.] But this statement which the government is apparently referring to does not appear until you have already read through four pages of testimony which precede it. You then begin to wonder what exactly it is that the government claims was false testimony. Is it only the statement that Keenan told Amsler that Frank Sinatra, Jr., would know about it beforehand? Or is it the whole conversation about the kidnapping plan? This doubt about what the government's contention is becomes an abiding conviction after going through this process for 140 legal-size pages. You cannot determine with any degree

of certainty exactly what it is about the testimony of the witnesses that is claimed to be false.

Rule 7(c) of the Federal Rules of Criminal Procedure requires that the indictment be "a plain, concise and definite written statement of the essential facts constituting the offense charged". Counts Two and Three of the second indictment now under consideration are not in conformity with this rule. This indictment is not plain, concise or definite. It is confusing, verbose and vague.

Judge Hall summed it up as follows in his order [Clk. Tr. 287-288]:

> "While the indictment is thus cast in five counts, it is apparent that the gravamen of the offenses charged is that the defendants induced Amsler and Irwin to testify falsely concerning matters which are described only by subject matter in Counts I, IV and V, which false testimony may, or may not, be found scattered somewhere among the 745 questions and answers that are contained in Counts II and III, or somewhere else in the 4500 pages of the Transcript of the evidence of the trial in Case No. 33,087-CR.
>
> "Since taking the Motions to Dismiss under submission, the Court has carefully and repeatedly examined the indictment and the authorities cited by the parties, as well as many others, and cannot conscientiously come to a judgment that the defendants are sufficiently informed by the indictment of the charges against them so as to be able to know what they must meet to defend themselves, or, in case any other proceedings are taken against them, arising out of or related to their representa-

tion of the defendants in Case No. 33,087-CR., they could plead a former acquittal or conviction. The indictment thus does not state an offense and is ordered dismissed and defendants' bonds exonerated."

3. The Materiality of the Testimony Is Not Shown.

Counts Two and Three of the second indictment allege materiality in general terms. At the end of each specification of perjury it is said: "And the above said testimony was material to the issues of guilt or innocence as framed by the indictment and the pleas of not guilty entered by all the defendants in Case No. 33087-CD." [Clk. Tr. 70-71.]

The government cites cases holding that materiality may be alleged generally in a perjury case. (App. Op. Br. 24.) We do not dispute the rule that it is sufficient to allege materiality generally in some cases, *i.e.,* in situations where the testimony is apparently material from reading the indictment. But a different rule applies when the materiality is not apparent.

United States v. Cobert (D.C.S.D. Calif. 1964), 227 F. Supp. 915, illustrates the type of situation where materiality must be shown. That case involved a charge of perjury in testifying before the grand jury. The indictment alleged the testimony and said that it was false and material. But you could not tell from the indictment why it was material because the nature of the inquiry before the grand jury was not disclosed. In dismissing the indictment, Judge Byrne noted and pointed out that in every case where a general allegation of materiality was permitted, the other allegations of the indictment did disclose the pertinency of the testimony.

The case now under consideration is concededly different from a grand jury investigation where the subject of inquiry is unknown. This was a kidnapping case. The subject matter is disclosed. One would expect that all of the evidence admitted at the trial was relevant to whether or not the defendants kidnapped Frank Sinatra, Jr. However, when you read the testimony of Irwin and Amsler that is quoted in Counts Two and Three of this indictment, you not only wonder about its materiality—it seems inconceivable that it was admitted in evidence.

Practically everything that is quoted is something one defendant said to another. Many of these alleged false conversations were after the defendants were arrested and waiting trial. For example, it is said: ". . . at said time and place, January 6, 1964, in the Los Angeles County Jail, Los Angeles, California, there was no conversation wherein Amsler said to Keenan, 'You told me that we would be out on bail by now, and so far I haven't heard from anybody. And I'd like to know what's behind this whole thing.'" [Clk. Tr. 86, lines 25-29.] How could this possibly be material? We must assume that the government has something in mind in claiming that it was pertinent to the issues of guilt or innocence. The fact remains that this specification of perjury is apparently *immaterial* from reading the indictment. The other specifications are similar. In each and every case there is a substantial question as to materiality.

Conclusion.

The second indictment does not state an offense. Counts One, Four and Five are defective for failure to set forth the alleged false testimony. The order dismissing the first indictment is *res judicata* on this point. Counts Two and Three are deficient because they do not allege the defendants' knowledge of the witness' knowledge of falsity. These counts also do not adequately specify what the claimed false testimony is, and they do not show materiality.

The trial judge carefully and repeatedly studied this indictment for several months. He concluded that he could not "conscientiously come to a judgment that the defendants are sufficiently informed by the indictment of the charges against them so as to be able to know what they must meet to defend themselves, or, in case any other proceedings are taken against them, arising out of or related to their representation of the defendants in Case No. 33,087-CR., they could plead a former acquittal or conviction."

The judgment is right and should be affirmed.

Respectfully submitted,

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Certificate.

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

JOSEPH D. MULLENDER, JR.